

ORDINANCE NO. 28530

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
TITLE 15 OF THE SAN JOSE MUNICIPAL CODE BY
ADDING A NEW CHAPTER 15.34 TO PROVIDE FOR
REGULATIONS OF STATE VIDEO FRANCHISE
HOLDERS**

WHEREAS, in 2006, the California Legislature passed the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), California Public Utilities Code Section 5800 et seq., which went into effect on January 1, 2007; and

WHEREAS, the State of California shall have sole franchising authority for video service providers ("Video Service Providers"), who are operating within the City of San José ("City") pursuant to DIVCA; and

WHEREAS, under DIVCA, the City may, by ordinance, enforce regulations of Video Service Providers who have obtained a state franchise under DIVCA ("State Video Franchise Holders"); and

WHEREAS, DIVCA provides that State Video Franchise Holders operating within the City shall pay to the City certain fees, including a fee for Public, Educational and Governmental ("PEG") purposes, if established by City ordinance, and the establishment and enforcement of penalties by the City for violations of customer service rules by State Video Franchise Holders;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

Title 15 of the San José Municipal Code is hereby amended to add a new Chapter to be numbered and entitled to read as follows:

CHAPTER 15.34
REGULATION OF STATE VIDEO FRANCHISE HOLDERS
Part 1
General Provisions

15.34.010 Purpose

- A. The purpose of this Chapter is to implement the provisions of the Digital Infrastructure and Video Competition Act of 2006 that are applicable to the City.
- B. Nothing herein is intended to affect the City's authority to regulate the City's cable franchise in accordance with San José Municipal Code Chapter 15.28 and to regulate the cable franchise currently in effect until such time as the cable franchisee no longer holds City franchise or is no longer operating under a current or expired City franchise.

15.34.020 Rights Reserved

The rights reserved to the City under this Chapter are in addition to all other applicable rights of the City, whether reserved by other provisions of the San José Municipal Code or as otherwise authorized by law, and no action, proceeding, or exercise of a right shall affect any other rights which may be held by the City.

15.34.030 Compliance

Nothing contained in this Chapter shall be construed to exempt a State Video Franchise Holder from compliance with all applicable ordinances, rules, or regulations of the City now in effect or which may be hereafter adopted which are not inconsistent with this Chapter or DIVCA.

Part 2

Definitions

15.34.200 Definitions

The definitions set forth in this Part shall govern the application and interpretation of this Chapter.

15.34.210 Director

“Director” means the Director of Public Works, or such other director designated by the City Manager to administer this Chapter.

15.34.220 DIVCA

“DIVCA” means the Digital Infrastructure and Video Competition Act of 2006, California Public Utilities Code Section 5800 *et seq.*, as may be amended.

15.34.230 Franchise Fee

“Franchise Fee” shall have the same meaning as the term is defined in California Public Utilities Code Section 5840, as may be amended.

15.34.240 Gross Revenues

“Gross Revenues” shall have the same meaning as the term is defined in California Public Utilities Code Section 5860, as may be amended.

15.34.250 Material Breach

“Material Breach” shall have the same meaning as the term is defined in California Public Utilities Code Section 5900, subsection (j), as may be amended.

15.34.260 PEG

“PEG” means public, educational, and government access.

15.34.270 State Video Franchise Holder

“State Video Franchise Holder” means a person that has been issued a State franchise by the California Public Utilities Commission to provide Video Service pursuant to DIVCA and that operates within the City.

15.34.280 Video Service

“Video Service” shall have the same meaning as the term is defined in California Public Utilities Code Section 5830, as may be amended.

15.34.290 Video Service Provider

“Video Service Provider” shall have the same meaning as the term is defined in California Public Utilities Section 5830, as may be amended.

Part 3
Fees

15.34.300 State Franchise Fees

- A. Each State Video Franchise Holder shall pay to the City a Franchise Fee that is equal to five percent (5%) of its Gross Revenues.
- B. The Franchise Fee shall be due to the City and paid to the Director of Finance in accordance with DIVCA.
- C. If the State Video Franchise Holder does not pay the Franchise Fee when due, the State Video Franchise Holder shall pay the City a late payment charge at a rate per year equal to the highest prime lending rate during the period of delinquency plus one percent (1%).

15.34.310 PEG Fee

- A. Each State Video Franchise Holder shall pay to the City a fee that is equal to one percent (1%) of its Gross Revenues.
- B. The PEG fee shall be due to the City and paid to the City's Director of Finance in accordance with DIVCA.
- C. If the State Video Franchise Holder does not pay the PEG fee when due, the State Video Franchise Holder shall pay the City a late payment charge at a rate per year equal to the highest prime lending rate during the period of delinquency plus one percent (1%).

15.34.320 Form of Payment

State Video Franchise Holders shall pay the Franchise Fees separately from the PEG Fees referenced in this Part to the City. Payment may be made in the form of a check or by other means approved by the City's Director of Finance.

Part 4
Customer Service

15.34.400 Customer Service Penalties

- A. State Video Franchise Holders shall comply with all applicable state and federal customer service and protection standards pertaining to the provision of Video Service.
- B. The City Manager or his or her authorized designee is authorized to enforce State Video Franchise Holders' compliance with state and federal customer service and protection standards.
- C. For purposes of this Part, written notices to be given to a State Video Franchise Holder shall be sufficient if given either by personal delivery thereof to the State Video Franchise Holder or by deposit in the United States Mail, in a sealed envelope postage prepaid, addressed to the State Video Franchise Holder at its last known address as the same appears in the public records or other records pertaining to the matter to which such notice is directed.
- D. The City Manager or his or her authorized designee shall provide written notice of any Material Breaches of applicable customer service standards to the State Video Franchise Holder.

- E. The State Video Franchise Holder shall have thirty (30) days from receipt of the City Manager's written notice to remedy the specified Material Breach.
- F. Material Breaches not remedied within the thirty (30) day time period shall be subject to the following monetary penalties to be imposed by the City Manager in accordance with DIVCA. The City Manager shall, by written notice to the State Video Franchise Holder, specify the amount of the penalty and the due date for payment.
 - 1. For the first occurrence of a violation, a monetary penalty of Five Hundred Dollars (\$500) shall be imposed for each day the violation remains in effect, not to exceed One Thousand Five Hundred Dollars (\$1,500) for each violation.
 - 2. For a second violation of the same nature within twelve (12) months for which notice has been provided to the State Video Franchise Holder and a penalty has been assessed, a monetary penalty of One Thousand Dollars (\$1,000) shall be imposed for each day the violation remains in effect, not to exceed Three Thousand Dollars (\$3,000) for each violation.
 - 3. For a third or further violation of the same nature within twelve (12) months for which notice has been provided to the State Video Franchise Holder and a penalty has been assessed, a monetary penalty of Two Thousand Five Hundred Dollars (\$2,500) shall be imposed for each day the violation remains in effect, not to exceed Seven Thousand Five Hundred Dollars (\$7,500) for each violation.
- G. The City Manager's decision on the imposition of a penalty shall be final.
- H. The disposition of penalties remitted to the City is governed by DIVCA.

Part 5
Excavation/Encroachment Permits

15.34.500 General Requirements

- A. Except as otherwise specified in this Part, State Video Franchise Holders shall comply with the provisions of Chapter 15.50 related to excavations and encroachments in City right-of-way.
- B. Any notice required to be given under this Part shall be given in accordance with Section 1.04.140 of the San José Municipal Code.
- C. The applicability of Sections 15.34.530 through 15.34.560 inclusive is limited to the Director's denial of a permit application only. The Director's decision to amend or revoke a State Video Franchise Holder's permit and any appeal thereafter shall be done in accordance with Part 6 of Chapter 15.50.

15.34.510 Application

Notwithstanding and subject to the provisions of Chapter 15.50, the Director shall approve or deny a State Video Franchise Holder's application for an excavation/encroachment permit within sixty (60) days of receiving a completed application. An application for an excavation/encroachment permit shall not be complete until the applicant has complied with all applicable laws and regulations, including but not limited to, all applicable requirements of the California Environmental Quality Act (CEQA).

15.34.520 Application Decision

- A. The Director shall notify a State Video Franchise Holder, in writing, of the Director's decision to approve or deny an encroachment/excavation permit.
- B. The notice of decision to deny the permit shall state the grounds for denial of the application.
- C. Notwithstanding Section 15.50.620, the State Video Franchise Holder may appeal the Director's decision to deny the permit to the City Council following the procedures specified in Section 15.34.530 of Part 6 of this Chapter.

15.34.530 Request to Appeal

- A. The State Video Franchise Holder may appeal the decision of the Director to the City Council by delivery to the City Clerk of a written request to appeal within ten (10) days of the date of the notice of decision.
- B. If there is no appeal filed within the time for appeal set forth in subsection A., then the decision of the Director shall be final.

15.34.540 Notice of Hearing

If a written request to appeal is timely filed with the City Clerk, the City Council shall hold a hearing. The City Clerk shall give the Video Franchise Holder written notice of the hearing which specifies the time, date and location of the hearing.

15.34.550 Time of Hearing

Each hearing shall be set for a date not more than ninety (90) days from the date of the notice of hearing unless the City Council determines that good cause exists for an extension of time.

15.34.560 Hearing

- A. The hearing by the City Council shall be de novo where evidence and argument, including, but not limited to, sworn testimony of witnesses and documentary evidence, may be presented.
- B. After closing the hearing, the City Council shall sustain, reverse or modify the Director's denial of the permit. A written notice of decision shall be issued and served on the State Video Franchise Holder in accordance with Sections 1.04.140 and 1.04.150 of the San José Municipal Code.
- C. The decision of the City Council shall be final.

Part 6

Undergrounding and Relocation

15.34.600 When Facilities Must Be Underground

- A. State Video Franchise Holders shall comply with the provisions of Chapter 15.20 and Chapter 15.24 related to the undergrounding of poles and overhead wires and the creation of underground utility districts.
- B. In those areas or portions of the City where the transmission or distribution facilities of State Video Franchise Holders are underground, or are hereafter required to be placed underground by the City, State Video Franchise Holders shall likewise construct, operate and maintain all transmission and distribution facilities underground. Amplifiers and couplings on the transmission and distribution lines may be constructed and maintained above-ground, if approved by the Director, in appropriate metal or concrete boxes or vaults as prescribed by the Director.

15.34.610 Changes Required by Public Improvements

- A. State Video Franchise Holders shall, at their own expense, protect, support, temporarily disconnect, relocate in the same street, alley or public property or place, or remove from any street, alley or public property or place, any of its property when required by the Director by reason of traffic conditions, public safety, street vacation, freeway or street construction, street widening, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines and tracks, or any other type of structures or improvements by the City or other governmental agencies when acting in a governmental or proprietary capacity, or any other structures or public improvements.

- B. Upon failure of a State Video Franchise Holder to commence, pursue or complete any work required by law or by the provisions of this Chapter or by any franchise or franchise renewal to be done in any street, public place or public property within the time prescribed and to the satisfaction of the Director, the Director may, at his or her option, cause such work to be done, and the State Video Franchise Holder shall pay to the City the costs thereof within thirty (30) days after receipt of an itemized report of such costs from the Director.

15.34.620 Relocation of Facilities

If at any time the City elects to alter, change the grade of or construct any street, alley or other public way, or any public property, the State Video Franchise Holder, upon reasonable notice by the City, shall remove and relocate its structures, lines and equipment, at its own expense, to the extent the City deems such to be reasonably necessary for the above purpose.

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PASSED FOR PUBLICATION of title this 21st day of April, 2009, by the following vote:

AYES: CAMPOS, CHU, CONSTANT, HERRERA, KALRA,
LICCARDO, NGUYEN, OLIVERIO, PYLE, REED.

NOES: NONE.

ABSENT: CHIRCO.

DISQUALIFIED: NONE.

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk